United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2138

To be argued by
MARIA L. MARCUS

United States Court of Appeals
FOR THE SECOND CIRCUIT

JANET GOTKIN and PAUL GOTKIN, individually and on behalf of all persons similarly situated,
Plaintiffs-Appellants,

against

ALAN D. MILLER, individually and as Commissioner of Mental Hygiene of the State of New York, MORTON B. WALLACH, individually and as Director of Brooklyn State Hospital, CHARLES J. RABINER, individually and as Director of Hillside Medical Center, and MARVIN LIPKOWITZ, individually and as Director of Gracie Square Hospital,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLEES

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR STATE APPELLEES

Questions Presented

1. Does appellant, who was a voluntary patient at state and private mental hospitals between 1962 and 1970 after a series of suicide attempts and threats, have a constitutional right of direct access to the records of such hospitalizations in order to assist her in writing a book?

2. Did the court below, after finding that neither the law of New York nor federal law supported appellant's

claim of a constitutional right to receive such hospital records in order to assist her in writing a book, properly grant summary judgment?

3. Where state appellees by affidavit affirmed the policy of the Commissioner of Mental Hygiene to release patient records to any licensed physician designated by the patient, but appellant has never designated a physician and requested that the Commissioner release the records to him, may appellant create a factual issue and demand a trial by assuming that if she had made such a request it would have been denied?

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (TRAVIA, J.), entered on July 24, 1974, granting defendants' motions for summary judgment.

Plaintiffs-appellants filed in the United States District Court for the Eastern District of New York a class action complaint dated April 12, 1974, requesting injunctive and declaratory relief against Alan D. Miller, Commissioner of Mental Hygiene of the State of New York, Morton B. Wallach, Director of Brooklyn State Hospital, Charles J. Rabiner, described in the complaint as Director of Hillside Medical Center, and Marvin Lipkowitz, Director of Gracie Square Hospital.

Plaintiff-appellant Janet Gotkin alleged that on several occasions beginning in 1962 and ending in 1970, she was a voluntary patient at Brooklyn State, Hillside, and Gracie Square Hospitals; that the precipitating cause of many of these hospitalizations was a series of suicide attempts and threats; and that she has not been hospitalized or treated for mental disorder since September, 1970. She alleged further that she is now writing a book about her experi-

ences and would like to obtain the records of her hospitalizations in order to verify factual information, and to compare the hospitals' version of incidents with her recollection.

Plaintiff-appellant Paul Gotkin, the husband of Janet Gotkin, alleged that he is co-author of her book. He did not allege that he has ever been a mental patient, or that any state mental hospital has ever denied him the right to examine his clinical records.

The complaint alleged that defendants' refusal to release the hospitals' records directly to plaintiff-appellant in order to assist her in writing her book, violates plaintiffs-appellants' constitutional rights under the First, Fourth, Ninth and Fourteenth Amendments of the United States Constitution.

POINT I

Appellants fail to demonstrate a violation of any constitutional provision.

Appellant Janet Gotkin was a voluntary patient at state and private mental hospitals between 1962 and 1970. She asserts a claim under the Fourteenth and Fourth Amendments, and the "constitutional right to autonomy", to obtain direct access to the records of these hospitalizations, in order to assist her in writing a book.* This assertion will not withstand analysis.

A. The Fourteenth Amendment

1. Appellants contend that unless appellees grant direct access to the hospital records at issue, Janet Gotkin will be stigmatized with a "badge of infamy" and will therefore be deprived of her liberty without due process of

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* Appellant Paul Gotkin is not a former mental patient, but

law. Cited for this proposition is *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971), in which the Supreme Court struck down a provision requiring the posting of a public notice that named individuals were alcoholics.

In the case at bar, appellees have made no attempt to publicize any information about appellant or her hospitalizations. Rather, it is appellants who wish to publish a book detailing Janet Gotkin's "experiences with psychiatry."*

Also cited are wholly inapposite decisions involving teachers ordered to take psychiatric examinations. In *Stewart* v. *Pearce,* 484 F. 2d 1031 (9th Cir. 1973), the plaintiff had been asked to submit to such an examination as a condition of continued employment, solely because he had participated in anti-war demonstrations. In *Lombard* v. *Board of Education,* —— F. 2d —— (2nd Cir. 1974) [No. 73-2057, decided July 22, 1974], appellant's employment was terminated on the primary ground that his conversation was disoriented and that therefore he was mentally unfit; this Court held that because a charge of mental illness is a heavy burden "for a young person to carry through life," a hearing must be accorded before such a finding is made.

However, appellant herein voluntarily sought psychiatric assistance and hospitalization because of a number of suicide attempts. The state did not initiate any proceeding to place her in the category of a mental patient. The hospital's view of its records as its own does not impute any "infamy" to former patients.

As the Supreme Court in *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972) observed, the word "liberty" in the Due Process Clause "must be given some meaning." Included within this meaning is freedom from bodily re-

* Brief, p. 3.

straint and from restraints on the right to engage in lawful occupations, to marry and have children, to choose a religion.

The claims at issue here are far afield from these elements of liberty. Appellees have neither attempted to prevent appellant from publishing her book, nor to affect her reputation adversely. Appellant's strained argument must therefore be rejected.

2. Despite the unequivocal holding in *Board of Regents* v. *Roth, supra,* that "property interests, of course, are not created by the Constitution" (408 U.S. at 577), appellants argue that they have a property right in the hospital records herein. They rely on *Lynch* v. *Household Finance Corp.,* 405 U.S. 538 (1972) in asserting that interests in property are federally protected civil rights. However, *Lynch* involved the elimination of the personal right-property right distinction under a *jurisdictional* section, 28 U.S.C. §1343(3). This section conveys no substantive entitlement, but rather, establishes jurisdiction in the federal courts to hear controversies over rights already acquired.

Neither the Constitution, federal statute, nor New York State statutory or common law, nor administrative regulation, nor contract between the parties, gives appellants a property interest in the psychiatric records at issue. State appellees adopt and incorporate by reference the discussion of the applicable New York and federal cases on this point in the brief of appellee Long Island Jewish-Hillside Medical Center (Point I).

Appellants argue that if Janet Gotkin "is one of the owners of these records, she is entitled to access to them" (p. 27). This is not the issue, however. Since appellant has demonstrated no basis for her claim of ownership, her claim of access must fall also.

B. The Fourth Amendment

Appellants also contend that the appellee hospitals have somehow seized their property in violation of the Constitution. The Fourth Amendment guarantees that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, shall not be violated . . .".

The hospitals compiled the records at issue during the period when appellant Janet Gotkin was a voluntary patient at these facilities; these files were not at any time seized from her. "When the individual freely exposes and transmits his thoughts and papers to others," the Fourth Amendment is not applicable. *United States* v. *Buck,* 356 F. Supp. 370, 376 (S.D. Tex. 1973). Indeed, appellants concede that the hospitals are properly in possession of these documents, since they recognize (p. 34) the hospitals' ownership interest and argue that Mrs. Gotkin "seeks only a copy, not to deprive the hospital of its only copy."

The cases cited by appellants, such as *Katz* v. *United States,* 389 U.S. 347 (1967), involve the kinds of property—such as intangible items—covered by the Fourth Amendment. None provide support for appellants on the two points which they must sustain: 1) that they have an ownership interest in the records and further, 2) that these records were obtained by appellees through a search or seizure. Clearly, appellants cannot prevail on either point.

C. The "Constitutional Right to Autonomy" or Privacy

Appellants, while noting that they do not base their claims on the right to "privacy" in the usual sense of the word (p. 40), contend that their constitutional right to "autonomy" in making decisions has been violated.

As with appellants' other constitutional claims, their discussion attacks "straw man" issues not present in the case before this Court. They argue that patients must

have enough information to make an intelligent choice about accepting or foregoing treatment, citing *Canterbury* v. *Spence,* 464 F. 2d 772 (D.C. Cir. 1972) and other cases. Appellees are not offering or suggesting any treatment to appellant Janet Gotkin. Moreover, the right to be informed about treatment options is not satisfied by, or equivalent to, the release of a patient's record to him. As can be seen from the carefully drawn guidelines of the Department of Health, Education and Welfare on informed consent,* the object is to give the patient the data necessary for him to assess the risk of embarking on or declining treatment. Such data would not even be contained in a patient's file.

Equally inapposite are *Roe* v. *Wade,* 410 U.S. 113 (1973), *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), *McCabe* v. *Nassau County Medical Center,* 453 F. 2d 698 (2nd Cir. 1971) and *Dwen* v. *Barry,* 483 F. 2d 1126 (2nd Cir. 1973). These cases all concern attempts to prevent individuals from controlling their own bodies or making decisions about marital relations and child-bearing. No such interference exists in the case at bar.

Appellants also refer to a right "to acquire useful knowledge" (*Meyer* v. *Nebraska,* 262 U.S. 390 (1923), *Board of Regents* v. *Roth, supra*). *Meyer* involved a language teacher who wished to teach German to children below the eighth grade level, but was prohibited by statute from doing so.

In essence, appellants' "right to useful knowledge" argument does not relate to any intervention in such a right by appellees. Rather, appellants are arguing that they have a constitutional right to compel appellees to turn

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* Fed. Reg., Vol. 39, No. 105, Part II, Protection of Human Subjects, § 46.3(c), Definition of Informed Consent, which includes: a fair explanation of the procedures to be followed and their purposes; the discomforts and risks, as well as the benefits reasonably to be expected; appropriate alternatives; the right to further explanation, and to withdraw consent without prejudice.

over their records.* The same argument was made below under a First Amendment rubric; plaintiffs-appellants argued that the First Amendment right to speak included the right to hear, and that, therefore, the records must be tendered to them. The District Court pointed out that the "right to receive information" has "never been used by the courts as a constitutional cudgel to compel an unwilling 'speaker' to impart information or ideas . . ." (A-10). It should be noted that appellants have abandoned their First Amendment argument in their brief before this Court.**

The court below evaluated each of appellants' constitutional contentions and found that none stated a claim upon which relief could be granted. Analysis of appellants' theories, and the cases cited to support them, demonstrates that the District Court's conclusion should be sustained.

POINT II

Appellees are entitled to judgment as a matter of law, and therefore summary judgment was appropriately granted.

Plaintiffs-appellants were repeatedly advised that while state defendants would not grant them direct access to the records at issue, the Commissioner of Mental Hygiene

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* The right to compel the government to release particular records is statutory. *Cf.* The Freedom of Information Act, 5 U.S.C. § 552, applicable to public documents of federal agencies, which created new rights to see certain data but exempted medical files. 5 U.S.C. § 552(b)(6).

** Appellants also argue that Janet Gotkin could be asked to waive the confidentiality of her records and send copies to employers or insurance companies. It should be noted that appellants make no allegation that they have ever signed such a consent, or that any third party has ever been permitted to see Janet Gotkin's records. Thus, no live grievance presenting the "case or controversy" essential to exercise of federal jurisdiction is present here.

would release these documents to any licensed physician designated by Janet Gotkin. Appellants have not chosen to make such a request of the Commissioner or to designate any physician. Yet, they now seek to create a factual issue and to demand a trial by hypothesizing as to what the Commissioner's policy might have been if the request had been made.

Defendants' brief below, filed on May 13, 1974, stated (pp. 7-8):

> "Plaintiffs could obtain the information they seek simply by requesting its release to a licensed physician acting on Mrs. Gotkin's behalf, who could in his discretion arrange to have a copy of the records given to plaintiffs. Only such portions of the records as would in his judgment be harmful to the patient or violative of the privacy of others, would be retained as confidential. This physician may be selected by Mrs. Gotkin, or she may request the director of a state hospital in which she was treated to designate a staff physician who would provide a comparable service."

Abbott Weinstein, who is responsible for the Mental Hygiene Department's Clinical Information Systems, filed an affidavit herein (A-20-22) affirming:

> "The former patient may designate any licensed physician in private practice, or he may request the Director of the State hospital in which he was treated to designate a physician on the staff of the State hospital to provide the comparable service. Except for the cost of preparing a standard treatment summary which is borne by the hospital, the cost of duplicating additional sections of the record would be borne by the former patient."

It was further stated:

> "If the physician concludes that the record contains no information which would be harmful to the

> former patient or which would violate the rights of others to confidentiality, he may arrange to have a copy of the record given to the former patient. If parts of the record would be harmful to the former patient or would violate the rights of others, copies of those parts would not be given to the former patient."

At the oral argument below, plaintiffs-appellants were again advised that they could request that the Commissioner* release the record to a licensed physician. They did not seek to do so. However, they characterize the contents of Mr. Weinstein's affidavit as "a sham" (Br. p. 48).

They also discount the Policy Manual of the Department of Mental Hygiene, which discusses the transmission of patient information to physicians, on the grounds that one section used the term "abstract." Other sections did not use this description.** Moreover, judicial notice may be taken of the fact that as part of on-going and extensive development of the Department's regulations and Policy Manual since the enactment of the new Mental Hygiene Law, § 2932 of the Manual now sets out in detail the procedures relating to access by former patients to medical records. This section, which is set out in full in the addendum to this brief, provides *inter alia* that such records "may be made available . . . to any physician desig-

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* Consent of the Commissioner, as well as that of the patient, is required under § 15.13(4) of the Mental Hygiene Law, which permits release of confidential records to physicians. Defendant Dr. Wallach, responding to Janet Gotkin's letter about her records, properly referred her to the Commissioner (A-35).

**E.g. § 2902(b)(4), (b)(11), and (b)(12). The confusion in appellants' argument is illustrated in their insistence that a trial should be had because of the District Court's finding that the State's administrative regulations did *not* give Janet Gotkin a property interest in her records (br. p. 45). Yet throughout their brief, appellants have vigorously expressed the *same* view: that the Department of Mental Hygiene did not permit a patient to have hospital records (see p. 44).

nated by the former patient to act on his or her behalf;" explains that the information is not given directly to the patient because of references to fellow patients and others, and the possibility that some information in the file might be detrimental to the patient or misleading; and authorizes the physician to make copies of the records or parts of the record available to the patient if he concludes that it "contains no information which would be harmful to the former patient or which would violate the rights of others to confidentiality."

In a singularly contradictory statement, appellants refuse to designate a physician but declare that there is no medical screening permitted (p. 44) and that no doctor "could predict Janet Gotkin's responses to seeing her records . . ." (p. 57).

The Supreme Court of the United States has recently reaffirmed that a finding of "an actual controversy" is a threshold requirement imposed by Article III of the Constitution. *Steffel* v. *Thompson*, —— U.S. ——, 42 U.S.L.W. 4357, 4359 (1974). There is no live controversy between the parties as to the Commissioner's release of records to designated physicians nor on whether a doctor, if chosen, would have made Janet Gotkin's entire record available or would have been unable to predict her behavior. There can be no trial on this question, as there is no genuine grievance. The sole point on which issue has been joined is appellees' refusal to release the hospitals' records directly to Janet Gotkin to assist her in writing a book.*

* It should be noted that appellants' belated reference to the 3-judge court procedure (p. 23) is inappropriate. They did not challenge the constitutionality of § 15.13 of the Mental Hygiene Law, nor request a 3-judge court. The decision below referred to the statute primarily to indicate that New York did not give mental patients a property right in their records; appellants state in their brief that "plaintiffs submitted an uncontradicted affidavit by one of the persons who participated in the drafting of that section that it was not the intention of the drafters to either acknowledge or deny former patients access to their own records" (p. 20).

The District Court found that since plaintiffs-appellants had failed to state a claim under any of the constitutional provisions cited, defendants were entitled to judgment as a matter of law. This Court in *Dressler* v. *M. V. Sandpiper,* 331 F. 2d 130, 132 (1964), rejected the restrictive summary judgment rule espoused in prior cases such as *Colby* v. *Klune,* 178 F. 2d 872 (2d Cir. 1949) and *Arnstein* v. *Porter,* 154 F. 2d 464 (2d Cir. 1946). Judge Kaufman, speaking for the court, stated (at pp. 132-133):

> "As explained by the Advisory Committee, the recent amendments to Rule 56 were designed to overcome just such cases, which, in the words of the Committee, have 'impaired the utility of the summary judgment device.' 'The very mission of the summary judgment procedure,' the Committee explained, 'is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule.' United States Code Annotated, Nov. 1973, pamphlet, pp. 55-56."

See also 6 MOORE'S FEDERAL PRACTICE, § 1.-02, Supp. 1973 at 53 (supplementing Par. 56.15 [1.-02], p. 2297, 2d ed. 1948).

In the case at bar, where appellants ask for a trial to determine how a procedure they never invoked might have worked, and where the issues to be resolved are questions of law, summary judgment was clearly appropriate under this Court's guidelines.

CONCLUSION

The decision of the District Court should be affirmed.

Dated: New York, New York, December 3, 1974.

Respectfully submitted,

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ADDENDUM

STATE OF NEW YORK
DEPARTMENT OF MENTAL HYGIENE
DEPARTMENT POLICY MANUAL

Section 2902—*Disclosure of Information*

b. 4) Physicians who have cared for a patient prior to admission and particularly those who will care for the patient leaving the hospital are considered to have a proper medical interest in information regarding the patient's condition and therapy. Therefore, upon request of any physician properly interested in a patient's condition, or upon request of the patient's family, the Director may provide such physician with information pertaining to the diagnosis, present condition, treatment and prognosis.

* * *

11) The patient's welfare should be the controlling consideration in acting on any request for information.

12) When a patient leaves the hospital and it is known that he may be under the care of a particular physician, it is desirable to send this physician a brief statement regarding the patient's release and advice of the availability of information, if needed, regarding the patient's condition.

* * *

Addendum.

*Section 2932—*Access to Records by Former Patients*

A. *Department Policy*

Information from the medical records of a former patient of a facility operated by the Department of Mental Hygiene may be made available upon the written request of the former patient to any physician designated by the former patient to act on his or her behalf in accordance with the provisions as set forth in this section.

B. *Information Obtained Through Physician*

Information about a former patient is made available through a physician rather than directly to the former patient for the following reasons:

1. Medical records ordinarily include information stated in technical medical terminology which might be misunderstood by an individual not medically trained;
2. The revelation of some information in a former patient's record could be detrimental to that individual's current mental well being;
3. Information in an individual's medical record often includes references to other individuals, such as relatives, friends or fellow patients, which

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* Date of Issue: 11/20/74.

should remain confidential in order to protect the rights of those other individuals.

C. *Information Disclosed to Former Patient*
The physician to whom the record has been made available provides an oral interpretation of the record's contents to the former patient and/or former patient's designees. If the physician concludes that the record contains no information which would be harmful to the former patient or which would violate the rights of others to confidentiality, he may arrange to have a copy of the record given to the former patient. If parts of the record would be harmful to the former patient or would violate the rights of others, copies of those parts should not be given to the former patient.

D. *Designation of Physician by Patient*
The former patient may designate any licensed physician or he may request the Director of the State facility in which he was treated to designate a physician on the staff of the State facility to provide the comparable service.

E. *Notification of this Policy to Physician*
When information from the medical record is made available to a physician for the purpose covered in this Section, a copy of Section 2932 should be sent with the record material in order to inform the physician of the relevant Department policy.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Carlos Paganini, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 3rd day of December, 1974, he served the annexed upon the following named person:

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Attorneys in the within entitled action by personally serving a true and correct copy thereof, ~~properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the government of the United States at Two World Trade Center, New York, New York 10047,~~ directed to said Attorneys at the addresses within the State designated by them for that purpose.

Carlos Paganini

Sworn to before me this
3rd day of December, 1974

Maura L. Manus
Assistant Attorney General
of the State of New York

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGELA FIORE, , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Defendants-Appellees herein. On the 3rd day of December , 1974 , she served the annexed upon the following named person :

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Angela Fiore

Sworn to before me this
3rd day of December , 1974

Assistant Attorney General
of the State of New York